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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1181

OSCAR RAMIREZ,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Oscar Ramirez respectfully prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 19, 1975, which affirmed Petitioner's conviction for possession of marihuana and conspiracy.

THE OPINION BELOW

The opinion of the Court of Appeals, reported at 513 F.2d 72, is reproduced as an Appendix to this petition at pages 15-25.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered on May 19, 1975. Thereafter a timely petition for rehearing and suggestion for rehearing en banc was filed on June 2, 1975 and denied by an order entered on June 18, 1975.

The Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Filing of this petition was timely under Rule 22(2).

QUESTION PRESENTED FOR REVIEW

Immediately prior to adjudging Petitioner guilty on a two-count indictment in a nonjury trial, the District Court considered the report of a presentence investigation which strongly implied that for a long period of time the defendant had been extensively involved in the South Texas marihuana traffic. In light of the mandatory provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure, may such a conviction *ever* be sustained on a theory of harmless error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841 (a):

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * *."

21 U.S.C. § 846:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by im-

prisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Rule 32(c)(1), Federal Rules of Criminal Procedure:

"(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

Petitioner also claims a denial of his right to due process of law under the Fifth Amendment.

STATEMENT OF THE CASE

On January 17, 1974 a Federal grand jury in the Waco Division of the Western District of Texas indicted Petitioner Oscar Ramirez, Leonelo Sanchez and others for violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Count 1 of the indictment alleged a conspiracy to possess 1,300 pounds of marihuana with intent to distribute in violation of 21 U.S.C. § 846. Count 2 alleged the substantive offense of possession with intent to distribute the same marihuana in violation of 21 U.S.C. § 841(a)(1).

A second indictment, arising from the same investigation and involving essentially the same transaction as the first, was returned on February 7, 1974 by a Federal grand jury in the Brownsville Division of the Southern District of Texas. That indictment charged six individuals (including Petitioner's brother, Rene Ramirez) with con-

spiracy to import and to possess with intent to distribute the same 1,300 pounds of marihuana that was the subject of the first indictment, although Petitioner was neither indicted nor named as a co-conspirator in this second case.

In response to a defense motion the proceedings involving Petitioner and Leonelo Sanchez were transferred from Waco to Brownsville for trial of all defendants before a single District Judge, the Honorable C. Clyde Atkins of Miami, Florida, presiding by designation. Following transfer Judge Atkins denied a Government motion to consolidate both indictments for trial, instead scheduling trial of the Brownsville defendants for Thursday, July 18, 1974 and the trial of Petitioner and Leonelo Sanchez for Monday July 22, 1974.[1]

Petitioner testified as a defense witness at the trial of his brother, Rene, and the other defendants named in the Brownsville indictment. While admitting to some extent his complicity in the transactions in question, Petitioner denied that his brother had been involved in any way, as a result of which Rene Ramirez was acquitted by a jury on the day the second trial began.

At that trial Sanchez waived his right to a jury and agreed with the Government to stipulate the evidence (Tr. 3-12), after which the Court immediately found him guilty on Count 2 of the Waco indictment and granted the Government's motion to dismiss Count 1 (Tr. 13). Sentencing was deferred until the disposition of Petitioner's case (Tr. 13-14).

Petitioner was then brought to trial on the same two-count indictment. Like Sanchez, he waived his right to

1. The cases against the other individuals originally named in the Waco indictment had been either dismissed or severed prior to trial.

a jury and agreed to stipulate that all testimony and other evidence presented during the preceding week at the trial on the Brownsville indictment should likewise be regarded by the Court as evidence in his case (Tr. 15-16, 19-22). At this point Judge Atkins adjourned the proceedings for the noon recess, stating that he wished to review his notes of the earlier trial before hearing argument from counsel regarding Petitioner's motion for judgment of acquittal on Count 1 of the indictment and before finally adjudicating Petitioner's guilt or innocence on either count (Tr. 22-24).

When the Court reconvened that afternoon, Judge Atkins stated after hearing argument that he had reviewed his notes of the earlier trial, reflected on the matter and concluded that the Government had proven beyond a reasonable doubt the essential elements of both offenses charged in the indictment. Accordingly, he thereupon adjudged Petitioner guilty on both counts (Tr. 29-30).

Proceeding to sentencing, the Trial Judge denied a request by Petitioner's counsel for permission to examine the report of the presentence investigation, stating that the Court had the reports in its possession—"one that relates to *both* of these defendants" (emphasis added)—and that it appeared that *neither* defendant had any prior criminal record (Tr. 31). In response to counsel's question as to whether the Court had examined any report pertaining to Petitioner prior to having adjudicated his guilt, Judge Atkins responded that he had received reports on both defendants during the noon recess; that he had reviewed the report relating to Leonelo Sanchez at that time because he had already been found guilty; and that the Sanchez report "virtually covered both of them" (Tr. 32).

At this point the Court announced that it wished to take a short recess for the purpose of reviewing Petitioner's report to "see if there is anything different in this report" and to "see if there's any *other* information" (emphasis added), remarking that apparently "the title is the same as the other" (Tr. 32-34). Following this recess, without further comment on the matter, the Court sealed both presentence reports in separate envelopes for inclusion in the record on appeal (Tr. 34).

The Court then immediately sentenced Petitioner to a term of imprisonment for four years on each count, the sentences to run *consecutively*, and a fine of $10,000 on each count, together with a special parole term of two years (Tr. 34-35). Leonelo Sanchez was sentenced to imprisonment for a term of four years, a fine of $10,000 and a two-year special parole term (Tr. 39). Without objection by the Government, Sanchez was accorded bail pending appeal (Tr. 47-49). At the urging of the Government, the Court revoked Petitioner's bail and remanded him to custody (Tr. 45, 47).

The Court of Appeals, characterizing Petitioner's trial as "somewhat peculiar," 513 F.2d at 76, affirmed his conviction over the claim that the District Court's violation of Rule 32(c)(1) of the Federal Rules of Criminal Procedure dictated reversal. The Court conceded that common to the pre-sentence reports of both Petitioner and Sanchez was a written sentencing recommendation captioned "Re: Rene Ramirez, Oscar Ramirez, Leonelo Sanchez," which strongly implied that Petitioner and his brother "had, for a long period of time, been heavily involved in major marihuana trafficking in South Texas."

513 F.2d at 77.[2] The Court also expressly held that this document "should *not* have been included in Sanchez' presentence report, and it should not have been read by the court prior to the adjudication of Ramirez' guilt." 513 F.2d at 77-78 (footnote omitted).

Nevertheless, the Court sustained the conviction on a theory of harmless error, concluding that Petitioner had admitted his guilt in the earlier trial and that therefore "it would have been impossible for the court to have found Ramirez innocent." 513 F.2d at 78. The Court also rejected the claim, made the basis for the motion for judgment of acquittal in the District Court, that in fact there was no evidence to support a finding of guilt on the conspiracy count because, at most, the proof established a conspiracy to *distribute* marihuana (rather than to possess it) and that, under the standard of due process prescribed by *Cole v. Arkansas*, 333 U.S. 196, 201 (1948), Petitioner could not be convicted on a charge for which he had never been indicted.

On petition for rehearing the Court of Appeals declined to explain how or why the Trial Judge could possibly have regarded the evidence of guilt as virtually conclusive when, rather than *immediately* adjudging Petitioner guilty (as had been done in the case of Sanchez), he had expressly *declined* to do so until after reviewing his notes of the earlier trial and hearing the arguments of counsel with respect to the conspiracy count.

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2. Because Petitioner's counsel have repeatedly been refused permission to examine this document, they cannot argue its potentially prejudicial impact beyond the more or less abbreviated summary offered by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to preserve the integrity of Rule 32(c)(1) of the Federal Rules of Criminal Procedure against a misapplication of the harmless error doctrine that, if tolerated, would seriously compromise the appearance of fairness and impartiality in Federal criminal prosecutions.

The Rule provides clearly and unequivocally that the report of a presentence investigation "shall not be submitted to the court or its contents disclosed to anyone until the defendant has pleaded guilty or has been found guilty." This Court has already held that "submission of the report to the court before that point constitutes error of the clearest kind." *Gregg v. United States,* 394 U.S. 489, 492 (1969). Since the Rule serves as much to avoid the appearance of impropriety as the fact of it, *United States v. Christakos,* 83 F. Supp. 520, 525 (N.D. Ala., 1949), *aff'd,* 178 F.2d 84 (5 Cir., 1949), it is ultimately aimed, "not merely at preventing prejudice to the defendant, but preventing even the possibility of prejudice." *United States v. Small,* 472 F.2d 818, 820-21 (3 Cir., 1972).

The spirit of the Rule is as unmistakable as the letter of it. "Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the ex parte introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence * * * would seriously contravene the rule's purpose of preventing possible pre-

judice from premature submission of the presentence report." *Gregg v. United States,* 394 U.S. at 492; 2 Wright, *Federal Practice and Procedure* § 523 (1969).

Certainly there are instances in which a technical violation of the Rule results in no discernible harm to the defendant because it cannot possibly have contributed to the ultimate verdict of guilt—for example, when the defendant has already plainly manifested his intention to plead guilty, *Smith v. United States,* 340 F.2d 953 (5 Cir., 1965), *cert. denied,* 382 U.S. 880; *United States v. Hopwood,* 422 F.2d 348, 349 (10 Cir., 1970), or when the Trial Judge reads the presentence report immediately before receiving the verdict of a jury and no further proceedings transpire before rendition of that verdict. *Gregg v. United States,* supra; *Calland v. United States,* 371 F.2d 295, 296 (7 Cir., 1966), *cert. denied,* 388 U.S. 916 (1967). In such cases, because the error has not infected the guilt-determining process, no violence is done to Rule 32 by concluding that the error is harmless.

An entirely different situation is presented when the Trial Judge, *sitting without a jury,* is exposed to a manifestly prejudicial presentence report in violation of the Rule. Because such an error invariably taints both the appearance of impartiality and the fundamental fairness of the proceedings leading to the ultimate adjudication of guilt, it can *never* be characterized as "harmless," irrespective of the quantum of evidence that might otherwise clearly support, or even compel, conviction.

Contrary to the conclusion reached by the Court of Appeals, it is altogether irrelevant whether the alleged evidence of the defendant's guilt was, in fact, "overwhelming." The real question is whether the violation of Rule

32(c)(1) revealed by the record has adversely affected the "substantial rights" of the accused. 28 U.S.C. § 2111; Rule 52(a), F.R.Cr.P. Obviously it has.

Rule 32 unquestionably guarantees a "substantial right" to every defendant in a Federal criminal prosecution—the right to have guilt or innocence of the offense charged adjudicated in open court exclusively upon the basis of competent evidence. Similarly, there is an equivalent right not to be adjudged guilty upon the basis of an amalgam of evidence derived both from the courtroom and from extrajudicial sources whose credibility and reliability are never tested in an adversary context. Violation of that right, irrespective of the proof properly presented, creates an apearance of impropriety that is the antithesis of due process of law. A defendant is entitled as a matter of due process, not merely to an impartial tribunal, but to one that *appears* impartial. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Bloom v. Illinois*, 391 U.S. 194, 205 (1968); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *Taylor v. Hayes*, ____U.S.____, 94 S.Ct. 2697, 2704-05 (1974).

Given the fact that the Rule 32 violation presented by this case fatally compromised the appearance of fairness in the proceedings leading to the finding of Petitioner's guilt, that departure from minimally acceptable procedural guarantees for a fair trial in a United States District Court cannot have been "harmless." "The question is not whether guilt may be spelt out of a record, but whether guilt has been found by [the trier of fact] according to the procedure and standards appropriate for criminal trials in

federal courts." *Bollenbach v. United States,* 326 U.S. 607, 614 (1946). The error here cannot be neutralized simply because "the appellate court is left without doubt that [the defendant], is, after all, guilty." *Id.* at 615.

There is nothing novel in the suggestion that, irrespective of how "overwhelming" the proof of guilt may otherwise be, there are some errors of substance and procedure that can *never* be characterized as "harmless." *Chapman v. California,* 386 U.S. 18, 23 (1967). For example, a defendant who pleads guilty may be guilty beyond question, but if the plea has been entered in violation of Rule 11 of the Federal Rules of Criminal Procedure that circumstance will not save the conviction. *McCarthy v. United States,* 394 U.S. 459 (1969). Similarly, if a judgment of criminal contempt is imposed in violation of the accused's Sixth Amendment right to trial by jury, it is not permissible to argue that from any conceivable perspective his conduct was almost unquestionably contemptuous. *Codispoti v. Pennsylvania,* ____U.S.____, 94 S.Ct. 2687 (1974). In such instances the issue of guilt is simply irrelevant.

The clear implication of the approach adopted by the Court of Appeals is that Federal criminal defendants who are indisputably guilty are not entitled to the same procedural protections afforded to those whose culpability is not altogether manifest. Such a philosophy trivializes the very notion of a fair trial and implies within the context of the present case that, even if the Trial Judge had publicly stated his intention to adjudge Petitioner guilty before ever hearing any evidence, that deficiency would have been ameliorated if only the Government's case appeared, in retrospect, irrefutable. That concept of "harmless error" is clearly insupportable.

Moreover, in point of fact the evidence against Petitioner was by no means as damning as the opinion of the Court of Appeals suggests. While Petitioner's testimony in the first trial had admittedly implicated him in a delivery of 1,300 pounds of marihuana to Federal undercover agents, that testimony also revealed a joint plan with Sanchez to pool separate and distinct caches of marihuana into a single consignment; neither participant ever possessed, or conspired to possess, 1,300 pounds. Yet neither Petitioner nor Sanchez was indicted or tried for distributing, or attempted distribution, or conspiracy to distribute. Petitioner's contention, at trial and on appeal, was that the variance between the charge of possession and the proof of distribution was fatal to the conviction. Irrespective of whether that position was legally sustainable, it cannot be said that the *Trial Judge*, in determining whether to accept or reject it, was uninfluenced by the information regarding Petitioner's alleged criminal propensities derived from the Rule 32 violation. Accordingly, there can be no suggestion that the error could not possibly have contributed to the ultimate adjudication of guilt. *Fahy v. Connecticut*, 375 U.S. 85, 87 (1963).

The decision of the Court of Appeals has sustained Petitioner's conviction at the expense of seriously undermining Rule 32(c). If the Rule is to be truly meaningful —something more than a mere advisory directive that may be followed or disregarded at will—its prohibitions must be enforced. Reliance on a misapplication of the harmless error doctrine will not accomplish that result.

For essentially the same reasons that motivated the grant of certiorari in *Gregg v. United States*, 394 U.S. 489 (1969), the Court should review this case.

CONCLUSION

For the foregoing reasons Petitioner Oscar Ramirez respectfully suggests that his petition for the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3045

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OSCAR RAMIREZ and Leonelo Sanchez,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

May 19, 1975

Before BELL, THORNBERRY and GEE, Circuit Judges.

GEE, Circuit Judge:

Oscar Ramirez and Leonelo Sanchez, among others, were charged in a two-count indictment with possession with intent to distribute approximately 1,300 pounds of marihuana[1] and with conspiracy to possess with the intent to distribute the same marihuana.[2] Both waived jury trial

1. A violation of 21 U.S.C. § 841(a)(1).

2. A violation of 21 U.S.C. § 846.

and were tried before the court on stipulated evidence. Sanchez' conspiracy count was dismissed. Ramirez, however, was tried and convicted on both counts. Sanchez was sentenced to four years' imprisonment and a two-year special parole term and fined $10,000 while Ramirez received two four-year terms of incarceration to be served consecutively and a two-year special parole term and was fined $10,000. Both appeal their convictions.

Before trial and the stipulation of evidence Ramirez and Sanchez moved to exclude from evidence the 1,300 pounds of marihuana, which they maintained was seized by D.E.A. agents following an illegal search. They admit that the agents who searched their truck had probable cause to believe marihuana was concealed in it; they argue, however, that the agents should have obtained a warrant before conducting their search since exigent circumstances were absent. They point out that four days before the search D.E.A. agents knew the marihuana would be transported from South Texas to Hillsboro, a town south of Dallas, by truck. Moreover, they had a description of the truck, knew its license number, knew the name of its driver, and knew where and how the marihuana was to be concealed within it. In addition to this four-day grace period, during the ten hours preceding the search D.E.A. agents had been trailing the truck as it proceeded from South Texas towards Hillsboro. Ramirez and Sanchez contend, therefore, that this is the case postulated in the dicta of Carlton v. Estelle, 480 F.2d 759, 762-63 (5th Cir.), cert. denied, 414 U.S. 1043, 94 S.Ct. 546, 38 L.Ed.2d 334 (1973), since the D.E.A. "had probable cause for search before their arrival on the scene, knowledge of factors bearing upon the likelihood of future movement, and time enough and assurance

enough to obtain a warrant beforehand," and thus missed a genuine opportunity to obtain a valid warrant authorizing the search of their truck. Further examination of the facts brought out at the suppression hearing, however, shows that the reliance which Ramirez and Sanchez place upon Carlton v. Estelle is reliance misplaced.

Ramirez and Sanchez were caught by what, until the evening of the search of their truck, was a well-planned and smooth D.E.A. operation. On October 16, 1973, in Mission, Texas, an undercover agent of the D.E.A. negotiated with Ramirez and Sanchez for the purchase of approximately 1,500 pounds of marihuana. The dope was to be transported by truck from the Mission/McAllen area to a motel just off Interstate Highway 35 in Hillsboro. There the undercover agent, who was the agent in charge of the operation, was to take delivery. The truck and a car left South Texas on the morning of October 20 with D.E.A. agents shadowing. The agent in charge, who had spent most of the day testifying in court in Dallas, drove to Hillsboro that evening to be in position for the delivery. When he arrived there between 8:30 and 9:00 p. m., however, he observed that the pre-arranged delivery spot, the motel, was not a favorable location for conducting a night-time operation. He then altered plans and proceeded south along I-35. The agent and the truck, along with its entourage, arrived in Waco at approximately the same time, about 10:00 p. m. There the truck stopped at a filling station and its occupants, as well as the occupants of the accompanying car, at a cafe. There the D.E.A. agents, who had abandoned their plan to take actual delivery of the marihuana at Hillsboro on radioed command of the case agent, arrested the occupants and searched the truck.

That the D.E.A. agent in charge may have had both sufficient time and probable cause to have obtained a warrant to search appellants' truck at Hillsboro has no bearing on whether exigent circumstances existed at Waco. Even if the bypassing of a genuine opportunity to obtain a search warrant is destructive of exigent circumstances, a proposition of extremely doubtful validity in light of the plurality opinion in Cardwell v. Lewis, 417 U.S. 583, 595, 94 S.Ct. 2464, 2472, 41 L.Ed.2d 325, 338 (1974), no genuine opportunity was bypassed here. This is so because the D.E.A. agents never intended to search appellants' truck at Hillsboro. They anticipated, rather, that the marihuana would be handed over to them and that a search warrant, therefore, would be unnecessary. We refuse to hold, as appellants have suggested, that the search at Waco was invalid because the D.E.A. agent in charge *could* have obtained a warrant for a search in Hillsboro which was never projected and never occurred. Needless to say, there is no requirement, constitutional or otherwise, that in order to validate unforeseen but possible searches law enforcement officials must obtain search warrants when the operation being conducted does not contemplate a search. The arrest of appellants and the search of their truck at Waco was made necessary by a change in the D.E.A.'s plan of operation. The necessity for the change did not become apparent until an hour or an hour and a half before the arrest and search. From the time that the D.E.A. agent in charge realized that the Hillsboro motel was an unfavorable location for a nighttime operation until the time of the search, it cannot be said that the D.E.A. missed any genuine opportunity to obtain a warrant for the search of appellants' truck. The search of the truck at Waco was well within the parameters

of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) and Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

In addition to the joint illegal search-and-seizure complaint, Ramirez, alone, contends that his convictions must be reversed in whole or in part because (1) the evidence does not support his conviction for conspiracy to possess with intent to distribute the marihuana, (2) the trial court judge, who was the factfinder, read his presentence report prior to finding him guilty and (3) both the trial judge and counsel for the government failed "to satisfy their affirmative constitutional obligation to disclose critically significant extrajudicial facts within their knowledge that were unknown to the defense and that, if known, would have had a material bearing on the decision to waive trial by jury and to stipulate the evidence." Prior to discussing these points we must highlight some of the events surrounding the somewhat peculiar trial of Ramirez.

Ramirez and Sanchez were originally indicted along with several other co-defendants in Waco. Another group of defendants, which included Ramirez' brother Rene, allegedly involved in the same transaction, was indicted in Brownsville. In response to a motion filed pursuant to Rule 21(b) of the Fed.R.Crim.P., the proceedings relating to the Waco indictment were transferred from the Western District of Texas to Brownsville, in the Southern District. Following transfer the trial judge denied a motion to consolidate and instead scheduled the trial of the Brownsville defendants for Thursday, July 18, 1974, and that of Ramirez and Sanchez for Monday, the 22nd. On Friday, Ramirez testified as a defense witness in the trial of his

brother Rene. As a witness he denied that Rene was in any way involved but admitted his own complicity in the transaction.[3] Over the weekend, early Sunday morning, three unidentified gunmen fired a number of shots into a Brownsville motel room, seriously wounding a government undercover agent who had been a key witness at the trial of the Brownsville defendants and who was scheduled to testify against Ramirez and Sanchez on Monday. On Monday, Ramirez and Sanchez were brought to trial as scheduled. Sanchez waived trial by jury and agreed with the government to a stipulation of the evidence. Based upon the stipulated evidence the court found Sanchez guilty on Count 2 of the Waco indictment and granted the government's motion to dismiss Count 1. Sentencing was deferred until the conclusion of Ramirez' trial. Next Ramirez waived trial by jury and stipulated that all the witnesses who had participated in Friday's trial would, if called, testify as they had previously. Following this stipulation and before passing on the guilt or innocence of Ramirez, the court recessed to review its notes of the first trial. Court was reconvened that afternoon, and the judge found Ramirez guilty on both counts of the Waco indictment. Just after the adjudication of guilt the following colloquy took place between the court and several of the lawyers involved in the case:

> THE COURT: Will he [Sanchez] come forward, too, please. I did adjudge Leonelo Sanchez guilty this morning, did I not?
>
> MR. YZAGUIRRE: Yes, Your Honor.
>
> THE COURT: All right. Is there any reason why we canot proceed with sentencing of both defendants?

3. Rene was acquitted by a jury.

MR. YZAGUIRRE: No, Your Honor.

MR. FOSTER: Your Honor, at this juncture, may we inquire—not being familiar with the Court's usual procedure, will we be allowed an opportunity to examine the presentence investigation?

THE COURT: No. I will tell you that I do have presentence reports, and none of them are—I would say the one that relates to both of these defendants, neither of them, the defendants appears to have any prior criminal record, is that true?

MR. FOSTER: That is true, my understanding.

MR. YZAGUIRRE: That is true, yes sir.

MR. FOSTER: But may Your Honor—may the record show the point in time—since these were reports, as I understand it, by agreement of the defendants that were prepared prior to trial—

THE COURT: Yes, sir.

MR. FOSTER: —may the record simply show from the report to what time those were delivered to the Court in this case since the Court itself passed on the question of guilt or innocence?

THE COURT: Well, I received these after our recess at noon today, and I have them available. I have reviewed the one with respect to Leonelo prior to this moment because, of course, he had been adjudged earlier. I would like to take a few moments and look further and see if there is anything different in this report. It virtually covered both of them. I'm looking to be sure. So I'll take a short recess. I might say I have received from Counsel or some—I guess it was Counsel—copies of letters of recommendation with respect to Oscar Ramirez.

MR. FOSTER: Well, we made no inference at all, Your Honor. It's just our understanding that in

> a case like this that the report should not actually come to the Court's attention, as such, until after a finding of guilt or innocence, and I'm sure that was the manner the Court handled it, but I did want it in the record.
>
> THE COURT: Yes. All right.

Ramirez' contention that his conviction must be reversed because the trial court violated Rule 32(c) of the Federal Rules of Criminal Procedure by reading his presentence report prior to adjudicating his guilt is simply answered. As the record clearly indicates, it was the presentence report of Sanchez and not that of Ramirez which the court viewed prior to the latter's conviction. Thus, even if Gregg v. United States, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969) does create a *per se* rule that a court's reading of a defendant's presentence report prior to a finding of guilt is reversible error, that rule would be inapplicable here. *Cf.* United States v. Duhart, 496 F.2d 941 (9th Cir.), cert. denied, — U.S. —, 95 S.Ct. 230, 42 L.Ed.2d 182 (1974).

We have reviewed Sanchez' presentence report. It consists of what are essentially three separate documents. One summarizes Sanchez' personal history and does not relate to Ramirez at all. The second is a report of the "official version" of the offense. It naturally covers Ramirez' participation in the crime. The third is a recommendation for sentencing which covers Ramirez, his brother Rene and Sanchez and which strongly implies that the brothers had, for a long period of time, been heavily involved in major marihuana trafficking in South Texas. This third document is styled Re: Rene Ramirez, Oscar Ramirez, Leonelo Sanchez. It should *not* have been in-

cluded in Sanchez' presentence report,[4] and it should not have been read by the court prior to the adjudication of Ramirez' guilt. However, here there is no possibility that the error was harmful. Ramirez, in his brother's trial, had taken the stand and admitted his complicity in the scheme to sell marihuana to the undercover agents. At his own trial he stipulated that if called to the stand he would again admit his guilt. Without abandoning the law and sanity, it would have been impossible for the court to have found Ramirez innocent.

Ramirez next contends that it was error for the court to find him guilty of participating in a conspiracy to possess the 1,300 pounds of marihuana with the intent to distribute it because it is undisputed that the weed was possessed, half by him and half by Sanchez, before their agreement to pool their resources and distribute them to

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4. An identical document, a Xeroxed copy, was included in Ramirez' presentence report. In the future, in order to avoid problems similar to the one which we face here, those preparing presentence reports in cases involving multiple defendants should sanitize all documents—except the official version of the offense—included in an individual defendant's presentence report, deleting all references to co-defendants, especially those relating to past criminal history or propensities. This is especially important when, as here, the report of one co-defendant is made available to the judge prior to the adjudication of guilt of another or others. We recognize, of course, that the official version of the offense will, of necessity, detail all co-defendants' alleged complicity in the crime. Because such an official version of the crime will likely be included in each defendant's presentence report, we feel that it would be better practice for the judge not to read the presentence report of any co-defendant prior to the adjudication of guilt of all defendants when, as here, such an adjudication is to be made in the immediate future. We do not mean to imply that the presentence report of a co-defendant should not include an official version of the offense or that the court should not read the official version when co-defendants are to be tried at different times as when, for instance, one co-defendant pleads guilty and another or others exercise their right to a trial by jury.

the undercover agents. He argues that neither he nor Sanchez, may correctly be found guilty of conspiring to possess a thing, all of which was owned and possessed by them, albeit severally, prior to the agreement to distribute. This argument misses the mark, for it focuses too closely on the word *possess* and erroneously interprets its contextual meaning. Ramirez was indicted for conspiracy to possess with the intent to distribute, not for conspiracy to obtain possession of. All that the government was required to prove was that Ramirez was party to an agreement which contemplated that the 1,300 pounds of marihuana would be held for distribution.[5] This it did.

Ramirez' final contention is that his conviction should be reversed because no one told him that one of the government's key witnesses would be unavailable for trial. He says that had he known of the government's problem he would not have waived jury trial and entered into a stipulation of the evidence. He is, in essence, asking us to extend Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to force the government to disclose not only all information in its possession which exculpates the defendant but also all information it has which might influence a defendant's choice of tactics. This we refuse to do. Ramirez' waiver of his right to a jury

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5. Even if an agreement to obtain were an element of the crime of conspiracy to possess with the intent to distribute, that element is present here. Prior to the agreement between Ramirez and Sanchez to pool their resources, the undercover agents had made it clear to both that they were not interested in purchasing small quantities of marihuana. The agreement to pool made marketable the marihuana owned by each individual. It is clear that Ramirez and Sanchez conspired together to obtain possession of a marketable quantity of marihuana. That this marketable quantity was formed from the individual caches of each is immaterial.

trial was knowing and intelligent, as was his decision to stipulate the evidence. He will not be heard to complain that he would have acted differently had he been informed of a weakness in the government's case against him. Requiring such disclosures is a far cry from *Brady*, which rests upon an abhorrence of the concealment of material arguing for innocence by one arguing for guilt.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-113

OSCAR RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This petition presents the question whether the district court's allegedly premature inspection of a presentence report requires the reversal of petitioner's conviction.

Following a nonjury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of 1,300 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and of conspiracy to do

the same, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of four years' imprisonment on each count, to be followed by two years' special parole. He was fined $10,000. The court of appeals affirmed (Pet. App. 15-25).

Petitioner, Leonelo Sanchez, and others were indicted in the Western District of Texas. Another group of defendants, who were alleged to have participated in the same transactions, were indicted in the Southern District of Texas at Brownsville. The second group included Rene Ramirez, petitioner's brother. Pursuant to Fed. R. Crim. P. 21(b), the trial of petitioner's indictment was transferred to Brownsville. The judge to whom the cases were assigned declined to hold a joint trial. He set the trial of the Brownsville defendants for July 18, 1974, and that of petitioner and Sanchez for July 22, 1974 (Pet. App. 19).

On July 19 petitioner testified as a witness at the trial of his brother. He denied that his brother was involved but admitted his own complicity. His brother was acquitted (Pet. App. 19-20).

On July 22 petitioner and Sanchez were brought to trial. Sanchez waived his right to a jury trial; he and the prosecution entered a joint stipulation of facts. The court found him guilty of conspiracy to possess marijuana with intent to distribute and granted the government's motion to dismiss the other count. The court deferred Sanchez's sentencing until the conclusion of petitioner's trial (Pet. App. 20).

Petitioner then waived his right to a jury trial and stipulated that all the witnesses who had participated in his brother's trial would, if called, testify as they had testified previously. After a recess to review its notes of the Brownsville trial, the court found petitioner guilty on both counts (Pet. App. 20).

Sentencing of petitioner and Sanchez followed immediately. A colloquy took place in which the court indicated that during the recess it had read Sanchez's presentence report. Sanchez's presentence report contained (in addition to portions relevant only to Sanchez) the "official version" of the crime, which included the "official version" of petitioner's participation in the crime and a recommendation for sentencing of petitioner, his brother, and Sanchez. This recommendation strongly implied that petitioner and his brother had been deeply involved in large-scale marijuana trafficking in southern Texas for some time (Pet. App. 20-22).

Petitioner argues that the court's exposure to this information in his co-defendant's presentence report, prior to the court's determination of petitioner's guilt or innocence, violated Fed. R. Crim. P. 32(c)(1). The court of appeals correctly held that such exposure, although undesirable, did not violate the Rule (Pet. App. 22). Fed. R. Crim. P. 32(c)(1) expressly refers to a defendant's *own* presentence report. The Rule is not meant to be, nor is it capable of being, a means of preventing background information concerning a particular defendant from coming to the attention of the court by other routes. For example, a defendant whose conviction is reversed on

appeal may be retried before the judge who presided over his first trial and sentenced him after studying his presentence report (*United States* v. *Small*, 472 F.2d 818 (C.A. 3)); similarly, a defendant may be tried before a judge who has presided over his trial and sentenced him on another charge. *Cabrera* v. *United States*, 347 F. Supp. 936 (D. Mass.); *Webster* v. *United States*, 330 F. Supp. 1080 (E.D. Va). See also *United States* v. *Duhart*, 496 F.2d 941 (C.A. 9), certiorari denied, 419 U.S. 967; *Smith* v. *United States*, 360 F.2d 590 (C.A. 5); *Warren* v. *Richardson*, 333 F.2d 781 (C.A. 9). These courts have held that Rule 32(c)(1) means no more than what it says; its strictures are not transgressed unless the court reviews a defendant's own presentence report prior to accepting his plea, receiving a jury's verdict, or rendering its own verdict.

Petitioner's reliance on *Gregg* v. *United States*, 394 U.S. 489, is misplaced. *Gregg* stands for the proposition that literal compliance with Rule 32(c)(1) is required; it did not interpret the meaning of that Rule. See *United States* v. *Duhart*, *supra*, 496 F.2d at 945-946. As the record indicates, the district court did not read petitioner's presentence report prior to its determination of his guilt or innocence; there has, therefore, been literal compliance with the Rule.

Whatever speculative prejudice petitioner may have suffered was, in any event, harmless.[1] Petitioner,

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[1] While we agree with the court of appeals' statement (Pet. App. 22-23) that the information concerning petitioner should

"in his brother's trial, had taken the stand and admitted his complicity in the scheme to sell marihuana to the undercover agents. At his own trial he stipulated that if called to the stand he would again admit his guilt. Without abandoning the law and sanity, it would have been impossible for the court to have found [petitioner] innocent" (Pet. App. 23).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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not have been in Sanchez's presentence report, we do not agree with the court's implication that the district court should not have read Sanchez's presentence report.

[2] Petitioner argued at trial that the stipulated evidence did not prove possession or conspiracy to possess marijuana, as charged in the indictment, but rather proved distribution and conspiracy to distribute. He now contends (Pet. 12) that the information in Sanchez's presentence report might have dissuaded the district court from accepting this argument. Thus, petitioner asserts, the error could not have been harmless. However, the court of appeals correctly held (Pet. App. 23-24) that there was no variance between indictment and proof. Petitioner is arguing that he was harmed because the information brought to the trial court's attention may have prompted the court to reject an erroneous legal argument. We submit that petitioner suffered no harm, within the meaning of the harmless error rule, because events may have made the court less likely to err.

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